Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, et al.,
Appellees.

GROUP W. CABLE, INC., et al.,
Appellants,

v.

FLORIDA POWER CORPORATION, et al.,
Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF AND BRIEF OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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MOTION OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC. FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

Nor-West Cable Communications and Preferred Communications, Inc. respectfully move for leave to file the attached *amici curiae* brief. The consent of the parties to this action was sought, but at this filing has not been received from all of them.

Nor-West Cable is a general partnership and Preferred Communications is a corporation, both of which have been organized for the purpose of disseminating news, information and entertainment, the former in the City of St. Paul, Minnesota, and the latter in the Watts area of the City of Los Angeles, California.

Both are presently in litigation with the respective cities where they seek to speak and publish concerning their right to obtain access to the necessary public utility facilities—poles and conduits—to operate a cable television system without the necessity of submitting to a municipal franchising process designed to select only a single company deemed "best" by local franchising authorities. (See *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986); *Nor-West Cable Communications v. City of St. Paul*, No. 85-5193 (8th Cir. 1986) [remanding to district court in light of *Preferred*].)

Nor-West Cable has a direct interest in this litigation.[1] Its ultimate vindication of its First Amendment right to speak and publish by means of cable television could well be aborted if it is nevertheless denied access to the necessary public utility services,

[1] Since the State of California has enacted legislation regulating the cost of pole attachment services (see Calif. Pub. Util. Code §767.5) the interests of Preferred Communications are not directly involved (see 47 U.S.C. §224(c)). The State of Minnesota, in contrast, has not enacted such legislation, and is therefore subject to the FCC's jurisdiction. (See FCC Public Notice, April 29, 1986 (Mimeo #4150)). Counsel for *amici* have been active in litigation concerning pole attachment problems in California and before the FCC, and Preferred Communication joins Nor-West Cable in this motion and the accompanying brief in order to make available to the Court the California experience with regard to the issues presented in this case.

even if it obtains a municipal license,[2] which could be the ultimate effect of an affirmance of the Court of Appeals' judgment in this case.

Amici have studied the jurisdictional statements and motions to affirm filed in this case, and have concluded that the parties have overlooked, or declined to set forth, fundamental facts which are central to the proper resolution of this litigation:[3] (1) the public utilities have, insofar as they are subject to the terms of 47 U.S.C. §224, *dedicated* their excess communications space to the use of cable television companies and (2) the provision of pole attachment services (as defined) to cable television companies is a *public utility service*. Once these facts are understood, the perceived "taking" problem disappears.

[2] *Amici* employ the term "license" as the most descriptive term for what local governments do with respect to cable television. (See 47 U.S.C. §522(8) ["franchise" means "a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system"].)

[3] What is here involved is *not* an incidental service occasionally supplied by the use of surplus facilities by one otherwise engaged as a public utility company; rather, at issue here is the provision of an essential service by a state protected monopolist using capital facilities which have been dedicated to that service by the Appellees for many years, i.e., a public utility service.

Accordingly, Nor-West Cable Communications and Preferred Communications, Inc., respectfully request leave to present their views on the issues raised by this litigation.

Respectfully submitted,

Harold R. Farrow
Sol Schildhause
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By: Harold R. Farrow
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QUESTIONS PRESENTED

1. Whether § 6 of the Communications Act Amendments of 1978, Public Law 95-234, 92 Stat. 35, as amended, codified as 47 U.S.C. § 224, which regulates the rates that cable television operators can be charged for pole attachment services provided by those utilities which have dedicated their communications facilities for the attachment or placement of cable operators' wires to utility poles or in conduits, effects a taking under the Fifth Amendment, or is merely a standard police power regulation of public utility services provided by the use of utility assets dedicated to the provision of such services.

2. Whether that section violates the just compensation requirement of the Fifth Amendment because it empowers an administrative agency to regulate the rates for the provision of such public utility services.

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AMICI CURIAE BRIEF OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC., IN SUPPORT OF APPELLANTS

INTEREST OF *AMICI*

Amici are companies organized for the purpose of disseminating news, information and entertainment by means of cable television. In order to speak and publish by means of cable television, it is necessary

for them to obtain pole attachment services, i.e., access to the communication space of the local public utilities—normally the telephone utility—for the purpose of attaching their cables to poles or placing them in conduits on or in the public utilities' easements (obtained by the exercise of the power of eminent domain) on, over, under or alongside of public and private property.

Amici are presently in separate litigation concerning the right to operate a cable television system without the necessity of foregoing their First Amendment rights by submitting to a municipal franchising process designed to select only a single company deemed "best" by local franchising authorities and which imposes conditions which have nothing to do with the local government's legitimate police power concerns. (See *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986); *Nor-West Cable Communications v. City of St. Paul*, No. 85-5193 (8th Cir. 1986) [remanding to district court in light of *Preferred*].)

Amici are concerned that, once cable companies have vindicated their First Amendment right to access to the necessary public utility facilities free from unreasonable municipal restraints, cable companies generally, and Nor-West Cable in particular, may nevertheless be denied the right to speak and to publish by the public utilities themselves.[1]

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[1] There is no such threat in California where the Legislature has explicitly found that private public utilities have dedicated their excess communications space to the use of cable television companies and that the provision of pole attachment services (as defined) is a public utility service. (See Cal. Pub. Util. Code §767.5.)

Pole attachments are defined as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." (47 U.S.C. §224(a)(4).) Thus, pole attachment services provided by utilities include not only the use of their poles, but use of all allied capital assets including their rights-of-way over both public and private property. (See, e.g., *Tex. Power & Light v. Federal Communications Com'n*, 784 F.2d 1265, 1272-73 (5th Cir. 1986).)

Without such services, most cable television companies could not operate, because of "the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed." (H.R. Rep. No. 721, 95th Cong., 1st Sess. 2 (1977).) But, if the public utilities are held to have the right to dictate the price at which they are willing to provide their public utility services, then that "right" will include the right to deny those services at any price to all cable systems, or to limit the number of such systems to a favored one, despite the fact that those same utilities have previously dedicated the excess communications space of their facilities to the provision of pole attachment services to cable television companies.

As the history of the anticompetitive actions of telephone utilities and the increasing interest of power utilities to enter the cable television market demonstrate, these fears are neither imaginary nor remote. Accordingly, what is a stake here is the existence of an independant cable television industry.

SUMMARY OF ARGUMENT

1. The legislative history of 47 U.S.C. §224, particularly in light of the FCC's regulatory experience

with the anticompetitive actions of the telephone utilities against independant cable television companies which Congress addressed, demonstrates that §224 is predicated on the fact that Appellees and other utilities have *dedicated* their communications space to the provision of pole attachment services as a *public utility service*. This case, therefore, is governed by standard public utility principles, rather than by the private property principles relied on by the Court of Appeals below. Under applicable public utility principles, the FCC's regulation of the rates which Appellees charge for their public utility services does not constitute a "taking" within the meaning of the Fifth Amendment, particularly since Appellees have been provided an adequate judicial remedy for challenging any alleged arbitrary actions which might be taken by the FCC.

2. Should this Court hold that Appellees have a Fifth Amendment right to be free from regulation of their charges for an essential service for electronic publishing, then the First Amendment rights of independent cable television operators will be jeopardized. The public utilities' prior anticompetitive actions against an independent electronic publishing industry is well documented, and there is a strong likelihood that, given the power to charge confiscatory rates or to deny pole attachment services entirely, public utilities will be able to monopolize the electronic publishing industry, contrary to the public interest.

3. If the Court concludes the present record is insufficient to resolve this case on the basis of Appellees' dedication of their public utility facilities, then the case should be remanded to the Commission for development of a full factual record.

ARGUMENT

I. Since the FCC's Regulation of the Charges for Pole Attachment Services Affects Only Those Public Utilities which Have Dedicated Their Excess Communications Space for the Provision of such Public Utility Services to Cable Television Companies, There Is No "Taking" of such Space by such Regulation

Cable television companies are in the business of providing interstate communications services. (*United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).) As noted above, however, installation of cable television systems to provide such interstate services normally requires the use of existing intrastate utility facilities since local governments do not permit dual pole plants in their communities for environmental reasons. (H.R. Rep. No. 721, 95th Cong., 1st Sess. 2 (1977).) Consequently, almost universally cable companies are compelled to procure pole attachment services from the utilities which own or control the local pole and allied facilities acquired by the exercise of the utilities' eminent domain powers. (See Sen. Rep. No. 580, 95th Cong., 2d Sess. 13 (1978) ["there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached"].)

Virtually from the outset, there has been a conflict of interest between the utilities and independent cable television companies with respect to the use of the necessary utility facilities and the price for and the conditions imposed on that use demanded by the util-

ities. In March, 1977, after years of study, the FCC concluded it did not have jurisdiction to regulate the rates charged for pole attachment services, which had been sought by the cable television industry. (*California Water & Telephone Co.*, 64 F.C.C.2d 753 (1977).) In September, 1977, the Legislature of the State of California responded to the cable industry's problem in that state by enacting a statute (Cal. Stats. 1977, Chap. 954, § 1) which contained a legislative finding

> that many public utilities have, through a course of conduct covering many years, made available the surplus space on and in their poles, ducts, conduits, and other support structures for use by the cable television industry for pole attachment services, and that the provision of such pole attachment services by such public utilities is and has been a public utility service.

The Act provided (1) a procedure for determining the charges for pole attachment services "[w]henever a public utility and a cable television corporation are unable to agree upon the terms, conditions, or compensation for pole attachments," and (2) for regulation by the California Public Utilities Commission. While the Act did not contain an express finding that the utilities had dedicated their surplus space to such use, the specific findings that were made dictated that conclusion (see, e.g., *Yucaipa Water Co. No. 1 v. Public Utilities Com.*, 54 Cal.2d 823, 827-28, 9 Cal.Rptr. 239, 240-41, 357 P.2d 295, 296-97 (1960)) and that fact was clearly an underlying premise of the Act.

The California Act was followed only five months later by the Communications Act Amendments of

1978, Public Law 95-234, 92 Stat. 33, § 6 of which enacted 47 U.S.C. §224, in response to the FCC's conclusion that it lacked jurisdiction to regulate pole attachment services. This Act granted jurisdiction over intrastate communications common carriers with respect to pole attachment services. (Sen. Rep. No. 580, *supra*, at 3.) It was designed to counterbalance the adhesive bargaining power the utilities enjoyed because of their monopoly control of the essential means for cable operators to engage in interstate business. (*Ibid.*) Specifically, "Federal involvement in pole arrangements [was to] . . . serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." (*Id.* at 14.)

Congress was careful, however, to confine federal involvement to

> only where space on a utility pole has been *designated* and is actually being used for communications services by wire or cable. Thus, . . . if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept . . . is to assure that the communications space on utility poles created as a result of private agreement . . . be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

(*Id.* at 15 [emphasis added].) Thus, only those utilities which "participate in the provision of communications space on utility poles" (*ibid.*) are subject to the FCC's jurisidiction; the Act does not, for example, "require a power company to *dedicate* a portion of its pole plant to communications use." (*Id.* at 16 [emphasis added].) If such space has been dedicated, however, then the utility may not discontinue such service "solely to avoid [FCC] jurisdiction." (*Ibid.*)

The foregoing demonstrates that the FCC's jurisdiction is predicated on the *dedication* of communication space by the utilities for cable television companies. This jurisdictional premise is more explicitly and fully stated in subsequent California legislation. (See *Century Federal v. City of Palo Alto*, 579 F.Supp. 1553, 1564-65 (N.D. Cal. 1984).) Current Public Utilities Code 767.5(b), enacted in 1980 (see Cal. Stats. 1980, Chaps. 646, § 2, & 652, § 2.), provides:[2]

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[2] "Support structure" is defined as including, but not limited to, "a utility pole, anchor, duct, conduit, manhole, or handhole"; "pole attachment" is defined as "any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility"; "surplus space" is defined as "that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders or regulations of the [public utilities] commission, to allow its use by a cable television corporation for a pole attachment"; "excess capacity" is defined as the "volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment"; and "usable space" is defined as "the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance." (Cal. Pub. Util. Code § 767.5(a)(3)-(6).)

> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision of such pole attachments is a public utility service delivered by public utilities to cable television.
>
> The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

What is explicit in California's legislation, is implicit in Congress' enactment of 47 U.S.C. §224, as the above exerpts from Senate Report No. 580 demonstrate. (See also 47 U.S.C. §541 [cable television "franchise shall be construed to authorize construction . . . over public rights-of-way, and through easements, which is [sic] within the area to be served . . . and which have been dedicated for compatible uses"].) Appellees and most other utilities have for years dedicated communications space on their facilities for the use of cable television companies, as the more than 10 million poles with attached television cables so eloquently demonstrate. (See Sen. Rep. No. 580, *supra*, at 13.)

Thus, the Court of Appeals below approached the constitutional question raised by Appellees with an incorrect set of premises. It accepted Appellees' characterization of the problem as one of involuntary and permanent use of their private property which, accordingly, was unconstitutional under the rationale of *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419 (1982). It found Appellants to be "unwanted guests" who have no right to overstay their welcome on the poles (*Florida Power Corp. v. F.C.C.*, 772 F.2d 1537, 1543 (11th Cir. 1985)) but who can not be dispossessed because of the FCC's rule that pole attachment services may not be discontinued to avoid FCC jurisdiction under 47 U.S.C.§224 (*id.* at 1544).

As shown above, however, that rule—*First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585, 1589 (1978)—was *intended* by Congress (Sen. Rep. No. 580, *supra*, at 16), because of the prior dedication of communications space for pole attachment services to cable television companies. The "burden" to continue such services, unless permitted to discontinue them by the appropriate regulatory authority, is simply a standard condition of assuming the responsibility of providing public utility services. (See, e.g., *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330, 332 (1925); *Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 543-44 (1930); *Alabama Public Service Com'n v. Southern R. Co.*, 341 U.S. 341, 352-53 (1951) [Frankfurter, J., concurring].)

Appellees are unlike the private trucker in *Michigan Public Utilities Com'n v. Duke*, 266 U.S. 570, 576 (1925) who

> has no power of eminent domain or franchise under the state, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation. . . .

On the contrary, Appellees satisfy all of the conditions found wanting in *Duke*. But, even if they didn't, Congress' imposition of control by the FCC over their rates for pole attachment services does not constitute a "taking" of Appellees' property. (See, e.g., *Nebbia v. New York*, 291 U.S. 502, 535-37 (1934); *Fordham Bus Corporation v. United States*, 41 F.Supp. 712, 715 (S.D. N.Y. 1941) [3-judge court].) Nor is the judicial review of the FCC's determinations provided by the Act so toothless as to afford Appellees no protection from arbitrary administrative action. (See, e.g., *Alabama Power Co. v. F.C.C.*, 773 F.2d 362, 372 (D.C. Cir. 1985); *Tex. Power & Light v. Federal Communications Com'n*, *supra*, 784 F.2d at 1275.) Accordingly, the judgment of the Eleventh Circuit should be reversed.

II. The Effect of Holding that Utilities Are Free from Federal Regulation of Their Rates and Conditions for Pole Attachment Services for Cable Television Will Be To Restrain the Right To Speak and Publish by Means of Cable and Will Grant Utilities a Monopoly Stranglehold on Electronic Publishing, Contrary to the Public Interest

The Court of Appeals below focused exclusively on Appellees' property rights and ignored the potential

consequences for the First Amendment rights of cable television operators and the potential economic and technological consequences for the public.

"The issue of the handling of the electronic media is the salient free speech problem of this decade." (Pool, *Technologies of Freedom* 10 (1983).) It is vitally important to keep access to this technology open, and not permit the utilities who own or control an essential gateway to entering the electronic publishing market to dominate that market. (See, e.g., *General Telephone Co. of Cal. v. F.C.C.*, 413 F.2d 390, 397, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969) [FCC's power to compel telephone utilities to obtain § 214 certificates before constructing cable systems for channel lease service to cable operators upheld]; *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 857 (5th Cir. 1971) [FCC's power to compel telephone utilities to offer the option of pole attachment services to cable television operators so as to allow them to build their own systems upheld]; *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 180-86 (D.C. D.C. 1982) [barring telephone utilities from electronic publishing field for period of time sufficient to permit healthy development of electronic publishing industry], *affirmed sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).)[3]

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[3] While it has normally been telephone utilities which have sought to control the development of cable television, power utilities have also begun entering the cable television market. (See, e.g., York & Malko, *Utility Diversification: A Regulatory Perspective*, 111 Pub. Util. Fortnightly, No. 1, p. 15, 20 (1983) [announcing seminars for *power utilities* on the advantages of diversifying by entering cable television market]; The Wall Street Journal, February 15, 1986, p. 5, col. 1 [noting *power utilities'* increasing diversification by going into the cable television business].)

There is a well documented history of anticompetitive conduct of the telephone utilities with respect to cable television companies. (See, e.g., *Telecable Corporation*, 19 F.C.C.2d 574 (1969); *Dimension Cable TV*, 25 F.C.C.2d 520 (1970); *Manatee Cablevision, Inc.*, 22 F.C.C. 2d 841 (1970); *Better TV of Dutchess County v. New York Telephone*, 31 F.C.C.2d 939 (1971); see also *TV Signal Co. of Aberdeen v. American Telephone & T. Co.*, 462 F.2d 1256 (8th Cir. 1972), and *TV Signal Co. of Aberdeen v. Am. Tel. & Tel.*, 617 F.2d 1302 (8th Cir. 1980), concerning the antitrust implications of the telephone utilities' one-attachment-per-pole policy predicated on an alleged concern for the technical integrity of the communications networks.) This experience led to the adoption of rules barring telephone utilities from owning and operating cable television systems within their service areas (see 47 CFR §63.54) and requiring telephone utilities to give cable companies the option of pole attachment services so as to allow them to construct their own cable television systems rather than being limited to leasing channels on systems built by the pole-owning utilities (see 47 CFR §63.57). (*Section 214 Certificates*, 21 F.C.C.2d 307 (1970), *affirmed, General Telephone Co. of Southwest v. United States, supra.*) The FCC concluded:

> The entry by a telephone company, directly or through an affiliate, into the retailing aspects of CATV service in the community within which it furnishes communications services can lead to undesirable consequences. This is because of the *monopoly position* of the telephone company in the

> community, as a result of which it has *effective control* of the pole lines (and conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service which, at present, is essentially a monopoly service in most population centers. *It can accomplish this by favoring its own or affiliated interest as against nonaffiliate interests in providing access to those pole lines or conduits. . . .*

(*Section 214 Certificates*, *supra*, 22 F.C.C.2d at 324 [emphasis added].) Also of interest is the fact that in those proceedings the Justice Department (1) argued that "the telephone companies have been seeking to extend their regulated telephone monopoly into areas of CATV and broadband coaxial cable, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future" (*id.* at 324); (2) expressed the belief "that there is a serious danger that the existing local monopoly position of telephone companies as communications common carriers may prevent the development of an independent CATV industry"; and (3) not only advocated the restrictions adopted by the FCC, but also felt the FCC should "prohibit the telephone companies from restricting a CATV operator's use of cables, except as shown to be necessary to protect the technical integrity of the communications network" (*id.* at 314).

Prior to the proceedings in *General Telephone Co. of Cal. v. F.C.C.*, *supra*, pole attachment agreements routinely contained extensive prescriptions on the services that the cable television company was allowed to provide. Many of these anticompetitive tactics were

abandoned by the utilities after the various unfavorable rulings of the FCC outlined above. However, during the early 1970's the pole-owning utilities—having lost their ability to force leased channel services on independent cable television operators by the devices of denying or delaying pole attachment service, and no longer being able to contain the threat of future competition by the insertion of anticompetitive terms into pole attachment agreements—responded by attempting confiscatory increases in pole attachment rates. These new efforts were resisted at the FCC until that agency concluded that it lacked statutory authority to regulate pole attachment services. (*California Water & Telephone Co.*, *supra*.) That development, in turn, led to the enactment of 47 U.S.C. §224, which is the focus of this litigation.[4]

When §224 and its implementing regulations are judged in their proper historical and regulatory context, it is clear that they implicate far more than Appellees' alleged private property rights. They impact equally, if not far more significantly, on both

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[4] By enacting §224, Congress undertook to ensure that the telephone utilities, which possess a monopoly over an essential communications pathway, will provide access to that pathway on reasonable terms and conditions. By placing §224 in that part of the Communications Act devoted to communications common carriers, moreover, Congress made clear its intent that pole attachments would be made freely available without discrimination. Nothing in §224, nor the the FCC's implementing regulations (47 CFR 1.1401-1 et seq.), authorizes a utility to impose extraneous preconditions on a cable television company's right of access to those poles. To the contrary, as shown above, §224 contemplates that where a utility has dedicated communications space for pole attachments, it must continue to do so on reasonable terms and conditions.

the First Amendment rights of cable television operators and the public's interest in the free and full development of the electronic publishing industry. For, if Appellees may freely regulate the use of an essential pathway to electronic publishing, they will be able to—and history strongly suggests they will—deny that means to any and all who pose a competitive threat to their dominance, if not their monopolization, of electronic publishing.

It would be ironic, indeed, if these regulated local common carriers, whose position as gatekeepers of the right to enter the electronic publishing market was acquired by the exercise of the eminent domain power in the name of the public's interest, are able to achieve indirectly, because of their asserted private property rights in their public utility facilities, what this Court has prevented them or others from achieving directly. (See, e.g., *United States v. American Tel. & Tel. Co.*, *supra*; *City of Los Angeles v. Preferred Communications Inc.*, *supra*.)

III. Should the Court Conclude It Has an Insufficient Factual Record To Hold that Appellees' Public Utility Facilities Have Been Dedicated to the Provision of Pole Attachment Services, It Should Remand the Case to the Commission To Establish a Satisfactory Record

Although the FCC's selected method of handling pole rate cases on the basis of a written record has to date had the effect of presenting a reviewing court with a paucity of background facts, *Amici* nevertheless believe that their previous outline of the legislative record regarding the jurisdictional basis for 47 U.S.C. §224, combined with the undeniable fact that virtually all cable television services are provided by

means of the use of pole attachment services on utility-owned poles, is sufficient to justify this Court's resolution of this Fifth Amendment case on the basis of Appellees' dedication of their public utility facilities for the provision of public utility services, i.e., pole attachment services. (See, e.g., *City of Los Angeles v. Preferred Communications, Inc.*, *supra*, 106 S.Ct. at 2038; *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979).)

If the Court entertains doubts about the jurisdictional basis for §224, however, it should order this case remanded to the Commission for the development of a full factual record. In this connection, the Court should be aware that there is presently pending before the FCC an unresolved Petition for Declaratory Ruling, for Rule Making, and for Institution of §403 Inquiry filed to determine the regulatory basis for its regulation of the rates and conditions for pole attachment services. (See *In re the Matter of Maintaining Cable Television's Open Access to Poles and Conduits Owned or Controlled by Telephone Companies*, F.C.C. Public Notice, Report No. D-219, April 18, 1984.)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be reversed or the case should be remanded to the FCC for development of a full factual record regarding the jurisdictional basis of 47 U.S.C. §224.

Respectfully submitted,

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